MOTION FILED

JUN 22 2000

No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,
Petitioner,

v.

RAYMOND LEVI COBB,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

MOTION FOR LEAVE TO FILE AND *AMICI CURIAE* BRIEF OF TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION, FLORIDA PROSECUTING ATTORNEYS ASSOCIATION, INC., NEW MEXICO DISTRICT ATTORNEYS ASSOCIATION, AND WEST VIRGINIA PROSECUTING ATTORNEYS INSTITUTE, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to the Rules of the Supreme Court, Rule 37.2(b), the Texas Association of District and County Attorneys and other *amici curiae* respectfully request leave of the Court to file the accompanying brief of *amici curiae* in support of Petitioner.

CONSENT OF THE PARTIES

Petitioner's consent to the filing of the accompanying *amici curiae* brief has been sought and granted. Respondent, however, has withheld his consent.

STATEMENT OF *AMICI* INTEREST

The Texas District & County Attorneys Association is an organization that serves its members by producing comprehensive continuing legal education courses for employees in prosecutors' offices, providing technical assistance to the prosecution community and related criminal justice agencies, and serving as a liaison between prosecutors and other organizations involved in the day-to-day administration of criminal justice.

All *amici curiae* joining this brief are similar organizations composed of individuals whose professions involve the investigation and prosecution of criminal activity. As such, the *amici* are acutely interested in the fair and efficient administration of criminal justice. The *amici* believe that this brief will not duplicate those of the parties. Rather, as a broad-based coalition of criminal justice professional organizations, the *amici* believe that they offer a unique

perspective on the issues at stake and that such a perspective will be of assistance in the Court's resolution of the case.

The *amici* support the petition for writ of certiorari both because *Cobb* presents an opportunity for this Court to resolve an important constitutional question upon which numerous state and federal courts disagree, and because the decision of the Texas Court of Criminal Appeals is contrary to the decisions of this Court concerning the attachment of the Sixth Amendment right to counsel and the application of this Court's decision in *Michigan v. Jackson*, which protects Sixth Amendment rights by proscribing police-initiated interrogation outside the presence of counsel after an accused has actively invoked his Sixth Amendment right to counsel. The *Cobb* decision especially burdens the members of the *amici* organizations by further confusing an already unsettled body of case law in the federal and state courts applying *Michigan v. Jackson*. The *amici* respectfully ask that this Court grant the writ of certiorari in order to provide clear guidance to the law enforcement community concerning the administration of Sixth Amendment rights.

Respectfully submitted,

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This is a capital case.

Questions Presented

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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B. Even if the burglary charges against Cobb caused his Sixth Amendment right to counsel to attach with respect to future capital murder charges, Cobb's mere acceptance of appointed counsel did not "invoke" the right for the purposes of *Michigan v. Jackson*. 6

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STATEMENT OF *AMICI* INTEREST

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The *amici* support the petition for writ of certiorari both because *Cobb* presents an opportunity for this Court to resolve an important constitutional question upon which numerous state and federal courts disagree, and because the decision of the Texas Court of Criminal Appeals is contrary to the decisions of this Court concerning the attachment of the Sixth Amendment right to counsel and the application of this Court's decision in *Michigan v. Jackson*, which protects Sixth Amendment rights by proscribing police-initiated interrogation outside the presence of counsel after an accused has actively invoked his Sixth Amendment right to counsel.

The *Cobb* decision especially burdens the members of the *amici* organizations by further confusing an already unsettled body of case law in the federal and state courts applying *Michigan v. Jackson*. This confusion is especially tangible in Texas due to a split of authority between state and federal courts. The *amici* respectfully ask that this Court grant the writ of certiorari in order to provide clear guidance to the law enforcement community concerning the administration of Sixth Amendment rights.

Argument

I. THE PROPHYLACTIC RULE OF *MICHIGAN V. JACKSON* DOES NOT APPLY BECAUSE COBB NEVER INVOKED THE SIXTH AMENDMENT RIGHT TO COUNSEL PRIOR TO HIS CONFESSION.

The ruling of the Texas Court of Criminal Appeals in *Cobb v. State*, No. 72,807, 2000 WL 175644 (Tex. Cr. App. Mar. 15, 2000), frustrates effective law enforcement by its unwarranted overapplication of the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986). Once a suspect accused of a criminal offense actually invokes his Sixth Amendment right to counsel, *Michigan v. Jackson* protects that suspect from police overreaching by prohibiting police-initiated custodial questioning regarding the charge at issue. The Texas court purported to rely on this rule in overturning Raymond Cobb's conviction for capital murders; however, Cobb never invoked his Sixth Amendment right to counsel. Therefore *Michigan v. Jackson* did not apply. The only act identified by the Texas Court of Criminal Appeals by which Cobb allegedly invoked his Sixth Amendment rights was his acceptance of appointed counsel when he was initially

charged with burglary. *First*, that act could not have been an invocation of Sixth Amendment rights with respect to the capital murder charges because Cobb's right to counsel for the capital murder charges had not yet attached. *Second*, the mere act of accepting appointed counsel is not sufficient to invoke the prophylactic measures prescribed by *Michigan v. Jackson*.

A. Cobb's Sixth Amendment right to counsel on capital murder charges did not attach until the commencement of judicial proceedings against him on those charges.

Michigan v. Jackson did not preclude police officers from questioning Cobb about the Owings murders. Cobb had already confessed by the time his Sixth Amendment right to be represented by counsel on capital murder charges arose, and thus he never invoked the right so as to prompt the application of *Michigan v. Jackson*.

Sixth Amendment rights are offense-specific. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Thus when the Sixth Amendment right to counsel has been invoked by a criminal defendant with respect to certain charges against him, law enforcement officers are not constitutionally prohibited from questioning the defendant about separate, uncharged offenses. *See id.* at 175-76.

Moreover, the Sixth Amendment right to counsel does not attach to a specific offense until the commencement of adversary judicial criminal proceedings. *See United States v. Gouveia*, 467 U.S. 180, 188 (1984). The Sixth Amendment right to counsel "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, '"at or after the initiation of adversary

judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."'" *McNeil*, 501 U.S. at 175-76 (quoting *Gouveia*, 467 U.S. at 188 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion))).

When these bedrock Sixth Amendment principles are applied to the facts of this case, it is plain that Cobb's acceptance of appointed counsel to represent him on *burglary* charges could not constitute an invocation of Sixth Amendment rights with respect to later-filed *capital murder* charges. Cobb confessed to burglarizing the Owings household on July 15, 1994. One month later, on August 15, 1994, attorney Hal Ridley was appointed to represent Cobb, solely for the burglary charge. With the permission of his counsel, Cobb voluntarily spoke to police investigators several times about the Owings disappearances outside the presence of counsel.

Proceedings against Cobb on capital murder charges were not initiated until after Cobb's father called the Walker County Sheriff's Office on November 11, 1995 to report that Cobb had confessed to the murders. An arrest warrant was obtained, and the police informed Cobb of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Cobb waived those rights without any statement indicating a desire to be represented by counsel, and Cobb then confessed to murdering Maggie and Kori Rae Owings.

The essential holding of *Michigan v. Jackson* is that "after the Sixth Amendment right to counsel attaches *and is invoked*, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at

issue (even if the accused purports to waive his rights) are inadmissible." *McNeil*, 501 U.S. at 179 (emphasis supplied). Cobb had already confessed by the time his Sixth Amendment right to counsel attached with respect to the capital murder charges. As a result, the prophylactic rule of *Michigan v. Jackson* did not apply to the police questioning of Cobb and Cobb's statements to the police should not be suppressed.

To the extent that there may be an extension of Sixth Amendment rights from application in the context of one charged offense to that of a "very closely related" or "inextricably intertwined" separate offense, *see, e.g., State v. Frye*, 897 S.W.2d 324 (Tex. Cr. App. 1995); *United States v. Arnold*, 106 F.3d 37 (3d Cir. 1997), the prophylactic rule of *Michigan v. Jackson* should not be applied in such a fashion as to undermine legitimate police interrogation undertaken, as was the case with Cobb's various interrogations, when the police investigate in good faith and without any motive of subverting the Sixth Amendment rights of the accused. In this case, however, it would be inconsistent with the "offense specific" nature of the Sixth Amendment as described in *McNeil* to treat the offenses at issue as inextricably intertwined, dictating the prior attachment of Sixth Amendment rights.

The Court in *McNeil* made clear that "[t]he purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil*, 501 U.S. at 177-78 (quoting *Gouveia*, 467 U.S. at 189) (emphasis in original). The adverse positions of Cobb and the

State of Texas did not solidify with respect to the Owings murders until police learned of Cobb's confession. Accordingly, Cobb's Sixth Amendment rights respecting those charges did not arise until Cobb's indictment on capital murder charges. By that time, Cobb had already confessed the murders to the police. As a result, Cobb's confession was properly used to secure his conviction for two counts of capital murder and that conviction should not have been reversed by the Texas Court of Criminal Appeals on Sixth Amendment grounds.

B. Even if the burglary charges against Cobb caused his Sixth Amendment right to counsel to attach with respect to future capital murder charges, Cobb's mere acceptance of appointed counsel did not "invoke" the right for the purposes of *Michigan v. Jackson*.

Even if, as wrongly assumed by the Texas Court of Criminal Appeals, Cobb's Sixth Amendment right to counsel on capital murder charges attached when judicial proceedings began on related burglary charges, the questioning in this case was proper. The prophylactic rule of *Michigan v. Jackson* does not apply unless the accused "invokes" his Sixth Amendment rights. The ruling of the Texas Court of Criminal Appeals was based on the mistaken view that Cobb's mere acceptance of appointed counsel was sufficient for the *Michigan v. Jackson* rule to apply.

In the consolidated cases considered in *Michigan v. Jackson*, respondents Bladel and Jackson had requested appointment of counsel at their arraignments. Bladel asked about his representation several times, but he was not told that

a law firm had been appointed to represent him. Subsequently, officers questioned Bladel and extracted a confession from him. Similarly, Jackson was questioned by police after having requested counsel, but before having the opportunity to meet with counsel. Both Bladel and Jackson were advised of their *Miranda* rights before they were subjected to police questioning, but the Court decided that their waiver of the Sixth Amendment right to counsel was incompetent because the questioning took place after both respondents had actively (and unsuccessfully) sought the assistance of counsel.

As pointed out by the dissenting judges on the Texas Court of Criminal Appeals, Cobb's case is factually distinguishable from *Jackson*. Importantly, unlike the respondents in *Jackson*, Cobb "did not unequivocally assert his right to counsel at any time before the police-initiated interrogation." App. at A-21 & n.11. In contrast, the Fifth Circuit has recognized that passively accepting the appointment of counsel does not constitute the "actual, positive statement or affirmation of the right to counsel" required to invoke the *Michigan v. Jackson* rule. *See Montoya v. Collins*, 955 F.2d 279, 282 (5th Cir. 1992). Thus, if certiorari is not granted in this case, Texas state courts will view the mere acceptance of appointed counsel as an invocation of Sixth Amendment rights for the purposes of *Jackson*. This will cause a significant conflict among state- and federal-court interpretations of *Jackson* within the State of Texas.

The State's petition for a writ of certiorari demonstrates that courts are divided on this question of what type of statement by the accused is necessary to invoke the

prophylactic rule of *Michigan v. Jackson*. *Compare Dew v. United States*, 558 A.2d 1112 (D.C. 1989), *and Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Cr. App. 1989), *with Montoya*, 955 F.2d 279 (5th Cir. 1992), *and State v. Carter*, 664 So. 2d 367 (La. 1995). This split of authority creates a hopeless dilemma for law enforcement officers entrusted with the responsibility of investigating crimes and prosecuting the perpetrators. As noted above, this dilemma is not hypothetical, but is very real for law enforcement officials within the State of Texas. Moreover, the confusion caused by *Cobb* and other similar rulings extends beyond Texas to all law enforcement officers who may not know which jurisdiction, either among states or between state and federal courts, will ultimately review the constitutionality of an interrogation. The consequence is that uncoerced confessions and evidence obtained as a result thereof may be lost due to uncertainty in the law. Without new guidance to clarify what procedures are acceptable under the Constitution, investigating officers will be essentially left to their own devices in walking the minefield of potential procedural pitfalls under the Fifth and Sixth Amendments.

The mere acceptance of appointed counsel should not be sufficient to apply the prophylactic rule of *Michigan v. Jackson*. Unlike an affirmative request for help in the context of adversarial proceedings, merely accepting the appointment of counsel does not unequivocally signal a desire to communicate with police only through counsel. The application of the *Michigan v. Jackson* prophylactic rule under such circumstances undermines the ability of law enforcement officers to investigate crimes and secure convictions of the guilty, tipping the scales too far in favor of

an accused defendant who has never affirmatively sought protection from police questioning. The Court should grant a writ of certiorari in order to resolve the split of authority on this important question affecting the administration of justice, in order to provide proper guidance to law enforcement officers and prosecutors charged with carrying out the directives of *Michigan v. Jackson*.

II. THE PROPHYLACTIC RULE OF *MICHIGAN V. JACKSON* DOES NOT APPLY BECAUSE COBB WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

A criminal defendant, even one who has representation with respect to other charged offenses, can unilaterally waive his Sixth Amendment right to counsel and agree to answer questions from police officers. To the extent that Cobb's Sixth Amendment rights had attached with respect to the capital murder charges against him, he waived his rights by consenting to questioning by police about the Owings disappearances.

A. After Cobb was charged with capital murder and read his *Miranda* rights, he made a knowing, intelligent, and effective waiver of his right to counsel.

In *Patterson v. Illinois*, 487 U.S. 285 (1988), the Court held that the *Miranda* warnings are sufficient to advise an accused of his Sixth Amendment right to have the assistance of counsel in interactions with the police. *See* 487 U.S. at 293-97. Moreover, if the accused is advised of his rights and he then voluntarily elects to answer police questions without requesting counsel, the accused's actions demonstrate a

knowing and intelligent waiver of his right to counsel, and the police are not prohibited from questioning him. *See id.*

After being arrested on charges of capital murder, Cobb was read his *Miranda* rights. He was then questioned in good faith by officers who did not have any reason to think that Cobb was represented by counsel. In fact, Cobb was not represented by counsel with respect to the capital murder charges, and he did not ask to speak to or wait for a lawyer. Though Cobb was represented by counsel for the temporally related burglary charge, the questioning officers did not know this and Cobb made no reference to that fact. If, as argued by the petitioner, *Michigan v. Jackson* did not apply, there can be no question that Cobb validly waived his right to counsel and his confession was properly used to secure his conviction.

B. By consenting to questioning about the Owings murders outside the presence of counsel, Cobb waived his Sixth Amendment right to counsel with respect to those yet-uncharged offenses.

Assuming, arguendo, that before Cobb was charged with capital murder his Sixth Amendment right to counsel had attached for those charges, Cobb waived that right by repeatedly submitting to police questioning about the disappearances outside the presence of his counsel.

The record plainly demonstrates that Cobb's lawyer was not (and did not even consider himself to be) representing Cobb on capital murder charges. When the police initially asked to speak to Cobb about the disappearances, both Cobb and his counsel consented on more than one occasion to questioning outside the presence of Cobb's counsel. These actions plainly demonstrated that Cobb did not have the

intention of communicating only with the assistance of counsel to the police about the Owings disappearances. In such a circumstance, the justification for the prophylactic rule of *Michigan v. Jackson* is not present, and the facts that Cobb was informed of his right to have the assistance of counsel and that he made a knowing and intelligent waiver of that right should be sufficient to establish an effective waiver.

Since Cobb plainly waived his right to counsel, the Court should grant a writ of certiorari to correct the Texas court's dangerous precedent and to provide more guidance regarding waiver of the right to counsel. There is no evidence that the police in this case schemed to deprive Cobb of his right to counsel or otherwise acted in bad faith. Allowing a murderer to escape judgment based on a true technicality would be utterly unjust. Perhaps more importantly, from a broader perspective, law enforcement officers and prosecutors must be able to rely on a facially valid waiver, such as the one obtained in this case, as a predicate to the investigation of crimes. If they cannot do so, they will run the risk of losing the ability to use fairly obtained evidence to bring criminals to justice.

Conclusion

The result reached by the Texas Court of Criminal Appeals will lead to continued confusion in the courts and in the law enforcement community about the proper application of the Sixth Amendment and this Court's ruling in *Michigan v. Jackson*. Law enforcement officials need clear guidance about the Sixth Amendment to enable them to carry out their duties and protect the public. The decision by the Texas Court of Criminal Appeals in *Cobb* is not mandated by this

Court's decision in *Michigan v. Jackson*, and it undermines the clear guidance on waiver provided by this Court in *Patterson* and *Brewer v. Williams*, 430 U.S. 387 (1977).

The Texas court was obliged to view the facts in the light most favorable to the trial court's decision not to suppress the evidence challenged in this case. The Odessa, Texas, police officers who questioned Cobb had absolutely no reason to believe that they could not proceed as they did, and they had no reason not to rely on Cobb's waiver of his Sixth Amendment rights when they questioned him about the Owings murders. There is not a scintilla of evidence to suggest that Cobb's confession was coerced or that the investigating officers otherwise acted in bad faith in this case. Yet, if the decision of the Texas Court of Criminal Appeals stands, there is a great possibility that a guilty murderer will not be effectively retried due to the prosecution's inability to use Cobb's confession and the physical evidence which was developed as a result of the confession.

This Court has recognized that "[t]he police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime.] . . . [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." *McNeil*, 501 U.S. at 175-76 (quoting *Maine v. Moulton*, 474 U.S. 150, 179-80 (1985)). In furtherance of that interest, the *amici curiae* submitting this brief respectfully ask that this Court grant certiorari in order to resolve the confusion in the courts and in the law enforcement community which has

resulted from decisions like this one from the Texas Court of Criminal Appeals.

Respectfully submitted,

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